Kedah Bioresources Corp Sdn Bhd v Aminudin bin Shuib & Anor

HIGH COURT (ALOR SETAR) — JUDICIAL REVIEW NO 25–10–9 OF 2016
HASHIM HAMZAH J
16 OCTOBER 2017

Civil Procedure — Judicial review — Certiorari — First respondent's service as chief executive officer of applicant's company terminated — First respondent made representation to Industrial Court — Industrial Court decided that first respondent's dismissal was without just cause and excuse — Applicant filed judicial review application — Whether Industrial Court had taken into account irrelevant considerations in finding that first respondent's termination was termination simpliciter — Whether Industrial Court failed to consider first respondent's acceptance of his termination

Labour Law — Employment — Termination — First respondent's service as chief executive officer of applicant's company terminated — First respondent made representation to Industrial Court — Industrial Court decided that first respondent's dismissal was without just cause and excuse — Applicant filed judicial review application — Whether Industrial Court had taken into account irrelevant considerations in finding that first respondent's termination was termination simpliciter — Whether Industrial Court failed to consider first respondent's acceptance of his termination

The first respondent was appointed as the vice president of the applicant's company for two years. After the expiry of the said contract period, the first respondent was appointed as the chief executive officer of the applicant's company. However, vide notice dated 23 July 2013 ('the termination letter'), the first respondent's service was terminated with immediate effect. The first respondent was compensated with three months' worth of salary for the termination. Subsequently, the first respondent filed a representation under s 20(3) of the Industrial Relations Act 1967. The Industrial Court ('the second respondent') decided that the first respondent's dismissal was without just cause or excuse. The second respondent further ordered the applicant to pay a sum of RM245,725.75 to the first respondent. Aggrieved by the said decision, the applicant filed the present application for judicial review, seeking for an order of certiorari to quash the said award. The applicant submitted that: (a) the second defendant had taken into account irrelevant considerations in finding that the first respondent's employment contract was intended to be a permanent and not fixed-term contract; (b) the second respondent had taken

into account irrelevant considerations in finding that the first respondent's termination was a termination simpliciter; and (c) the second respondent did not consider the first respondent's acceptance of his termination.

Held, allowing the applicant's application with costs of RM2,000 subject to allocator:

(1) The applicant's submission in (a) was not so much of an issue in the present case. This issue particularly arises when the employer allows the employment contract to lapse through effluxion of time and refuses to extend the employment contract. In the present case, the applicant's employment was terminated on 23 July 2013 when the employment contract was still in existence (see paras 21–22).

(2) The said termination letter did not give any reasons for the first respondent's termination except the relevant provision of the contract that the applicant relied on in dismissing the first respondent. This amounted to a termination simpliciter. The second respondent had committed an error of law and had not reasonably consider the reasons by the employer behind the first respondent's dismissal. In totality, the explanation given by the applicant through its witness constituted as just cause and excuse (see paras 27, 29 & 33–34).

(3) In cases when termination was of immediate effect, the non-objection of receiving compensation in lieu of notice indicated that the employee had accepted his termination. These facts and principles were never considered by the second respondent (see paras 35 & 37).

[Bahasa Malaysia summary

Responden pertama telah dilantik sebagai naib presiden syarikat pemohon selama dua tahun. Selepas tamat tempoh kontrak tersebut, responden pertama telah dilantik sebagai ketua pegawai eksekutif syarikat pemohon. Walau bagaimanapun, melalui notis bertarikh 23 Julai 2013 ('surat penamatan'), perkhidmatan responden pertama telah ditamatkan dengan serta merta. Responden pertama telah diberi pampasan untuk tiga bulan gaji kerana penamatan itu. Berikutan itu, responden pertama telah memfailkan satu representasi di bawah s 20(3) Akta Perhubungan Perusahaan 1967. Mahkamah Perusahaan ('responden kedua') telah memutuskan bahawa pemecatan responden pertama adalah tanpa sebab atau alasan yang adil. Responden kedua selanjutnya telah memerintahkan pemohon untuk membayar sejumlah RM245,725.75 kepada responden pertama. Terkilan dengan keputusan tersebut, pemohon telah memfailkan permohonan ini untuk semakan kehakiman, memohon perintah certiorari untuk membatalkan award tersebut. Pemohon berhujah bahawa: (a) defendan kedua telah mengambil kira pertimbangan yang tidak relevan apabila mendapati bahawa kontrak pekerjaan responden pertama bertujuan untuk menjadi kontrak yang tetap dan tidak

mempunyai tempoh tetap; (b) responden kedua telah mengambil kira pertimbangan tidak relevan apabila mendapati bahawa penamatan responden pertama adalah penamatan simpliciter; dan (c) responden kedua tidak mengambil kira penerimaan penamatan responden pertama. A

Diputuskan, membenarkan permohonan pemohon dengan kos RM2,000 tertakluk kepada alokatur: B

(1) Hujah pemohon dalam (a) bukan isu dalam kes ini. Isu ini terutamanya timbul apabila majikan membenarkan kontrak pekerjaan tamat melalui peluputan masa dan enggan melanjutkan kontrak pekerjaan. Dalam kes ini, pekerjaan pemohon telah ditamatkan pada 23 Julai 2013 di mana kontrak pekerjaan masih wujud (lihat perenggan 21–22). C

(2) Surat penamatan tersebut tidak memberikan apa-apa sebab untuk penamatan responden pertama kecuali peruntukan relevan kontrak yang mana pemohon bergantung kepada untuk memecat responden pertama. Ini merupakan penamatan simpliciter. Responden kedua telah melakukakan kesilapan undang-undang dan tidak mempertimbangkan secara munasabah sebab-sebab majikan memecat responden pertama. Secara keseluruhan, penjelasan yang diberikan oleh pemohon melalui saksinya merupakan sebab dan alasan yang adil (lihat perenggan 27, 29 & 33–34). D E

(3) Dalam keadaan di mana penamatan mempunyai kesan serta merta, tiadanya bantahan menerima pampasan menggantikan notis menandakan bahawa pekerja itu telah menerima penamatannya. Fakta dan prinsip tersebut tidak diambil kira oleh responden kedua (lihat perenggan 35 & 37).] F

Notes

For cases on certiorari, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5956–5968. G

For cases on termination, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1490–1504.

Cases referred to H

Airspace Management Services Sdn Bhd v Col (B) Harbans Singh a/l Chingar Singh [2000] 3 MLJ 714; [2000] 4 CLJ 77, CA (refd)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)

Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304; [1981] 1 LNS 5, FC (refd) I

Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129; [1981] 1 LNS 30, FC (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)

Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors [1996] 3 MLJ 489; [1996] 4 CLJ 747, CA (refd)
Holiday Villages of Malaysia Sdn Bhd v Menteri Sumber Manusia & Anor [2009] 6 MLJ 402; [2010] 7 CLJ 683, CA (refd)
Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1984] 1 MLJ 363, FC (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
Mohamad Faziron Musa lwn Aseania Resort Langkawi [2012] 2 LNS 131, IC (folld)
Smart Glove Corp Sdn Bhd v Industrial Court, Malaysia & Anor [2006] 6 MLJ 664; [2006] 4 CLJ 920, HC (refd)
Tenaga Nasional Bhd v Yahaya bin Jusoh [2014] 1 MLJ 483; [2014] 2 CLJ 498, CA (refd)
Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia Inc [1998] 5 MLJ 535; [1997] 1 LNS 99 (folld)

Legislation referred to

Industrial Relations Act 1967 s 20(3)

Siti Rafidah Abdul Raof (Aswandi Hashim & Co) for the applicant.
Mohamad Hairol Kamal Razali (Badruzzaman & Kamal) for the first respondent.

Hashim Hamzah J:

INTRODUCTION

[1] The first respondent was appointed as the vice president of the applicant company for a period of two years ie from 5 January 2010–24 January 2012 with a monthly salary of RM7,500.

[2] After the expiry of the contract period, the first respondent was appointed as the chief executive officer ('CEO') of the applicant company for a period of two years supposedly from 25 January 2012–24 January 2014 with a monthly salary of RM9,500.

[3] However, by way of a notice dated 23 July 2013, the first respondent's service was terminated by the applicant with immediate effect ('the said termination letter').

[4] The decision to terminate the first respondent's contract was made through a special board of directors' meeting held on 22 July 2013, a day before the said termination letter was issued.

[5] Be that as it may, the applicant had compensated the first respondent with three months worth of salary, inclusive of allowances, in lieu of the three month's notice, as required under the employment contract. The first respondent received payment but made no oral or written complaints regarding his termination.

[6] Then, the first respondent filed a representation under s 20(3) of the Industrial Relations Act 1967 ('the IRA 1967').

[7] By way of Award No 893 of 2016 dated on 11 August 2016 ('the said award'), the second respondent decided that the first respondent's dismissal was without just cause or excuse. The second respondent ordered the applicant to pay a sum of RM245,725.75 to the first respondent.

[8] Dissatisfied with the decision of the second respondent, the applicant proceeded to file this application for judicial review, seeking for an order of certiorari to quash the said decision and the said award.

[9] On 1 November 2016, the applicant had successfully obtained leave for the judicial review application and an order to stay the execution of the said award.

[10] This matter was heard before me. Below is the grounds of my decision.

LAW

[11] It is trite law that judicial review is a supervisory jurisdiction of the courts over the decisions of inferior courts, tribunals, bodies or persons in the performance of their respective public acts and duties.

[12] It is a form of a judicial control on how a particular administrative action is exercised (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374).

[13] It is also trite law that judicial review is only concerned with the manner in which the decision was made, since it is not an appeal of the impugned decision (*Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417).

[14] In short, judicial review is only concerned with the decision-making process and not the decision itself (*Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 1 MLJ 363), in which the applicant must specifically identify and plead the impugned decision

(*Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1).

[15] However, the court may review even the substance of the decision where there is illegality, irrationality or impropriety. In the Court of Appeal case of *Tenaga Nasional Bhd v Yahaya bin Jusoh* [2014] 1 MLJ 483; [2014] 2 CLJ 498, Tengku Maimun JCA in delivering the judgment of the court held as follows:

> The role of a High Court in hearing a case of judicial review is highly limited and rules governing judicial review application differ from that of a normal appeal as judicial review is not an appeal from a decision but a review of the manner in which the decision was made. It is not the function of the High Court to review the evidence and substitute its own view for that of the decision-maker and the High Court should not interfere with the decision of the Industrial Court unless there is a real error of law. *There are limited exceptions though, where review may extend to substance of the decision and not just the decision making process ie, where there is illegality, irrationality or impropriety* (*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493; [2006] 2 CLJ 501; *Jye Tai Precision Industrial (M) Sdn Bhd v Victoria a/p Arulsamy* [2008] 2 MLJ 57; [2008] 1 CLJ 760). (Emphasis added.)

[16] The Court of Appeal in the case of *Holiday Villages of Malaysia Sdn Bhd v Menteri Sumber Manusia & Anor* [2009] 6 MLJ 402; [2010] 7 CLJ 683 defined illegality, irrationality and impropriety in the following words of Ramly Ali JCA (as he then was):

> [10] According to Lord Diplock in the case of *Council of Civil Service Union & Ors v Minister for the Civil Service* [1985] 1 AC 374; [1984] 4 All ER 935, one can conveniently classify the grounds upon which administrative decision is subject to control by judicial review in three categories, namely; illegality, irrationality and procedural impropriety.
>
> [11] *'Illegality' refers to a situation where the authority concerned has been guilty of an error of law in its action* ie, purporting to exercise a power it does not have. *'Irrationality' refers to a situation where the authority exercises a power in so unreasonable a manner* ('*Wednesbury* unreasonableness'). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Lastly, *'procedural impropriety' refers to a situation where there is a failure on the part of the authority to observe procedural rules that are expressly laid down in the legislature instruments by which its jurisdiction is conferred even where such failure does not involve any denial of natural justice*. (Emphasis added.)

[17] I also find it pertinent to refer to a passage of the Court of Appeal's decision in the case of *Airspace Management Services Sdn Bhd v Col (B) Harbans Singh a/l Chingar Singh* [2000] 3 MLJ 714; [2000] 4 CLJ 77, where Gopal Sri

Ram JCA (as he then was) in delivering the judgment of the court held that:

> The authorities therefore establish a clear distinction between cases involving a review of facts as found by the Industrial Court based on the credibility of witnesses and those where no such exercise is involved. *Cases where intervention has taken place, such as, Rama Chandran and those decisions that followed it fall into two categories*. The first category comprises of cases where what is undertaken is an objective assessment of the reasonableness of the Industrial Court's decision based on the facts as found by the Industrial Court. *The second are cases where the Industrial Court failed to have regard to the issues raised by the parties or took into account some irrelevant consideration in arriving at its conclusion, apart from any specific findings of fact based on the credibility of witnesses*. But where the Industrial Court has accepted or rejected the evidence of a particular witness and gone on to make a finding based on such acceptance or rejection, the High Court is bound to accept such finding. (Emphasis added.)

FINDINGS OF THE SECOND RESPONDENT

[18] The relevant findings of the second respondent are as follows, and I quote:

> Selepas meneliti keterangan dan hujah-hujah pihak-pihak, mahkamah mendapati bahawa berdasarkan jawatan pihak menuntut dan skop kerja beliau sebagai CEO di syarikat responden iaitu seorang yang menjadi ketua adalah jenis pekerjaan yang kekal dan bukan bersifat sementara.
>
> Jawatan CEO adalah jawatan tetap/kekal yang wujud sebelum dan selepas pihak menuntut tidak bekerja di syarikat responden. Tindakan responden memperbaharui kontrak perkhidmatan pertama yang tamat pada 25hb Januari 2012 secara otomatik dan tanpa sebarang temuduga yang baru dengan terma-terma yang lebih baik telah memberi gambaran bahawa pekerjaan pihak menuntut adalah bersifat tetap.
>
> Notis penamatan bertarikh 23hb Julai 2013 tidak mengatakan sebab-sebab kenapa pihak menuntut ditamatkan perkhidmatannya kecuali melalui peruntukan Article 3 Part III. Adalah menjadi prinsip undang-undang perusahaan yang mantap dan amalan di Mahkamah Perusahaan bahawa majikan harus memberi alasan yang konkrit untuk menamatkan perkhidmatan pekerjaannya. Ini adalah satu kes 'termination simpliciter' yang dilakukan oleh pihak majikan.
>
> Berdasarkan alasan-alasan di atas, mahkamah mendapati penamatan perkhidmatan oleh responden terhadap pihak menuntut adalah tanpa alasan yang adil dan munasabah.

THE APPLICANT'S CASE

[19] Basically, it was mainly submitted by learned counsel for the applicant that:

A (a) the second respondent had taken into account irrelevant considerations in finding that the first respondent's employment contract was intended to be a permanent and not a fixed-term contract;

(b) the second respondent had taken into account irrelevant considerations
B in finding that the first respondent's termination was a *termination simpliciter*; and

(c) the second respondent did not consider the first respondent's acceptance of his termination.

C THE FIRST RESPONDENT'S CASE

[20] The first respondent basically contended that the second respondent was right in holding that the first respondent's termination was a termination simpliciter and the employment contract was intended to be a permanent
D employment contract.

Issue 1: Whether the second respondent took into account irrelevant considerations in finding that the first respondent's employment contract was a permanent and not a fixed-term contract
E

[21] This is not so much of an issue in the present case. This issue particularly arises when the employer allows the employment contract to lapse through effluxion of time and refuses to extend the employment contract.

F

[22] In the present case, the applicant's employment was terminated on 23 July 2013 when the employment contract was still in existence and was supposed to end on 24 January 2014.

G **[23]** As such, I do not wish to dwell any further on this issue.

Issue 2: Whether the second respondent took into account irrelevant considerations in finding that the first respondent's termination was a termination simpliciter

H **[24]** A termination simpliciter is a termination by contractual notice and for no reason. A termination simpliciter would amount to a dismissal without just cause or excuse if the employer fails to show that the termination was grounded on any just cause or excuse.

I **[25]** Raja Azlan Shah CJ (as he then was) in the Federal Court case of *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129; [1981] 1 LNS 30 had summarised the principles regarding termination simpliciter enunciated in another Federal Court case of *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304; [1981] 1 LNS 5 in the following words:

> In *Dr A Dutt v Assunta Hospital,* this court held that the so called 'termination simpliciter' ie, a termination by contractual notice and for no reason, if ungrounded or any just cause or excuse would still be dismissed without just cause or excuse and the workman's compensation, the Industrial Court may award reinstatement or compensation in lieu of reinstatement.

[26] The same was also adopted by Raus Sharif J (as His Lordship CJ then was) in the High Court case of *Smart Glove Corp Sdn Bhd v Industrial Court, Malaysia & Anor* [2006] 6 MLJ 664; [2006] 4 CLJ 920.

[27] In my opinion, the said termination letter did not give any reasons for the first respondent's termination except the relevant provision of the contract that the applicant relied on in dismissing the first respondent ie Article 6 Part III of the Conditions of Employment General Terms and Conditions of Contract Employment for Executives and Non-Executives. I am of the considered view that this amounts to a termination simpliciter, as opposed to learned counsel for the applicant's submission.

[28] However, what the second respondent failed to do was to further consider whether the termination was done with or without just cause or excuse.

[29] After perusing the second respondent's grounds of decision, I found that the second respondent failed to consider the reasons behind the first respondent's dismissal as evident from the applicant's witness that:

> Mesyuarat Khas Lembaga Pengarah Responden diadakan bagi membincangkan mengenai Kontrak Perkhidmatan Pihak Yang Menuntut. Ini diakibatkan daripada pilihanraya umum yang berlaku dan pertukaran pucuk kepimpinan kerajaan Negeri Kedah Darul Aman. Penstrukturan semula dijalankan dalam syarikat PKNK termasuklah Syarikat Berkaitan Kerajaan 'Government Linked Company' iaitu syarikat KTPC dan anak-anak syarikat ...
>
> Penamatan perkhidmatan Pihak Yang Menuntut sebagai Ketua Pegawai Eksekutif adalah disebabkan oleh keputusan keadaan politik yang timbul akibat perubahan di pucuk pimpinan Kerajaan Negeri Kedah selepas pilihanraya umum diadakan. Perubahan yang berlaku di dalam Perbadanan Kemajuan Negeri Kedah (PKNK) juga termasuklah Syarikat Berkaitan Kerajaan 'Government Linked Company' seperti Kulim Technology Park Corporation (KTPC) dan Anak-Anak Syarikat.

[30] A government-linked company (GLC) is called as such in circumstances where one or more of an instrument of the state is a substantial shareholder in such company. Since the state is the substantial shareholder of the company, any changes in the state government will undoubtedly affect the operations of these companies.

[31] Furthermore, in *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489; [1996] 4 CLJ 747, the Court of Appeal held:

> An employer may reorganise his commercial undertaking for any legitimate reason, such as promoting better economic viability, but he must not do so for a collateral purpose, for example, to victimise his workmen for their legitimate participation in union activities. Whether the particular exercise of managerial power was exercised bona fide or for collateral reasons is a question of fact that necessarily falls to be decided upon the peculiar circumstances of each case.

[32] I am also in full agreement with Abdul Kadir Sulaiman J (as he then was) in *Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia Inc* [1998] 5 MLJ 535; [1997] 1 LNS 99 who held that:

> It must be brought to the attention of all parties *that the right to reorganise the company is the prerogative of the management* to achieve maximum efficiency and effectiveness and to avoid any kind of duplicity of work in the company. *The prerogative belongs the company provided it is done bona fide*. (Emphasis added.)

[33] As such, I am of the opinion that the second respondent had committed an error of law and had not reasonably consider the reasons by the employer behind the first respondent's dismissal.

[34] I am further of the view that taken in totality, the explanation given by the applicant through its witness constituted as just cause and excuse.

Issue 3: The second respondent did not consider the first respondent's acceptance of his termination

[35] Regarding this issue, I agree with the decision of the Industrial Court in the case of *Mohamad Faziron Musa lwn Aseania Resort Langkawi* [2012] 2 LNS 131 which held that in cases when termination was of immediate effect, the non-objection of receiving compensation in lieu of notice indicates that the employee had accepted his termination.

[36] The following was observed:

> Responden mempunyai niat untuk menamatkan perkerjaan pihak menuntut, niat ini telah disampaikan kepada pihak menuntut. mengapa responden berniat sedemikian tidak dinyatakan dengan jelas dalam perbicaraan setelah dibantah oleh peguam pihak menuntut. Setelah pihak menuntut bekerja dengan responden selama lebih kurang lima tahun empat bulan, barulah responden mempunyai niat tersebut terhadap pihak menuntut. Mahkamah berpendapat (*view*) responden mempunyai alasan yang cukup kuat untuk menimbul dan melaksanakan niat tersebut. Jika tidak sudah tentulah pihak menuntut tidak dapat bekerja begitu lama dengan responden.

Pihak menuntut juga telah dibayar sebulan gaji sebagai ganti kepada sebulan notis oleh responden. Kiraan untuk membuat bayaran pampasan kepada pihak menuntut telah dibuat dengan bantuan Jabatan Tenaga Kerja Langkawi. Sebanyak dua kali jabatan berkenaan membantu membuat kiraan bayaran pampasan berkenaan.

Pihak menuntut telah menerima bayaran tersebut dan tidak membuat sebarang bantahan atau menolak gantian notis berkenaan. Perlakuan pihak menuntut itu boleh disimpulkan yang beliau menerima pemberhentian kerjanya.

Melihat kepada keseluruhan senario kes ini, mahkamah berpuas hati dan mendapati bahawa pihak menuntut telah diberikan hak, peluang dan dilaksanakan prinsip keadilan semulajadi terhadapnya.

Oleh yang demikian pihak menuntut tidak boleh lagi selepas itu mempertikaikan bahawa pemberhentian kerjanya adalah salah dan tidak mematuhi prinsip keadilan semulajadi.

[37] These facts and principles were never considered by the second respondent.

CONCLUSION

[38] For reasons enumerated above, the applicant's application is hereby allowed with costs of RM2,000 against the first respondent subject to allocator.

Applicant's application allowed with costs of RM2,000 subject to allocator.

Reported by Dzulqarnain Ab Fatar